

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Adam C.,

Claimant,

vs.

Eastern Los Angeles Regional Center,

Service Agency.

OAH No. 2012020938

DECISION

Administrative Law Judge (ALJ) Deborah M. Gmeiner of the Office of Administrative Hearings (OAH) heard this matter on March 27, 2012, in Alhambra, California.

Adam C. (Claimant) was represented by his mother and legal conservator, Bertha C. (mother).¹ Claimant was present throughout the hearing. Spanish language interpreter, Sonia Hernandez, translated for mother. Veronica Valenzuela represented the Eastern Los Angeles Regional Center (ELARC or Regional Center).

Oral and documentary evidence was received and the ALJ took official notice of OAH decisions in the following matters: *Maria M. v. Eastern Los Angeles Regional Center*, OAH Case Number 2011110680 and *Jeffrey S. v. Eastern Los Angeles Regional Center*, OAH Case Number 2011100971. The parties were reminded that these previous decisions have no precedential value. The matter was submitted for decision at the conclusion of the hearing.

¹ Claimant, his mother, and Gloria M. are identified by first name and last initial to protect their privacy.

ISSUE

Should the decision of Eastern Los Angeles Regional Center to deny funding for additional in-home respite services in lieu of out of home respite be sustained?

FACTUAL FINDINGS

Claimant's History

1. Claimant is an 18-year-old man who is a Regional Center consumer. He has a diagnosis of autism, mental retardation, and a seizure disorder. Claimant's mother is his legal conservator. Claimant lives with his parents and his older sister. Claimant attends a special day class five days per week at Villa Esperanza School through the Montebello Unified School District. Claimant's school program is working on self-help, vocational skills, functional academic education, speech, and behavior goals.

2. Claimant receives 273 hours of In Home Support Services (IHSS) provided by his mother. Regional Center funds 30 hours per month of in-home respite services for Claimant's care. His primary respite provider is his sister. Claimant also receives Social Security disability benefits.

3a. Claimant has numerous behavioral and safety, self-help, and medical needs. Claimant is non-verbal. He expresses his needs with gestures and sounds. He is described as having attention deficit disorder, and engages in self-injurious/self-abusive behaviors, including hitting himself on the head, and aggressive behaviors such as throwing things. Claimant has little safety awareness. His family keeps the home locked to prevent him from running away. He wears a harness so his family can limit his mobility. He will touch hot pans in the kitchen and open moving car doors. He is resistive to requests made of him and becomes frustrated on a daily basis. He smears his diaper, smells things, opens water faucets to play with water, puts his foot in the toilet, and hits things to make noise. He engages in repetitive body movements with his hands and his body. He will scream loudly, but will stop when prompted. He does not like to be around people who make a lot of noise. He has engaged in inappropriate sexual activity. He has attacked and bitten others, including a hospital security guard, a doctor, and a nurse. Regional Center has offered behavior intervention services to assist mother with Claimant's maladaptive behaviors. Although Claimant has received such services in the past and receives them in school, mother currently does not want behavior intervention services at home.

3b. Claimant needs assistance with all of his self-help activities. He is not fully toilet trained. He needs complete assistance with hygiene including bathing and

brushing his teeth. He is able to eat with a fork and spoon but cannot bring his food to the table without spillage.

3c. Claimant has a grand mal seizure one time every week. He takes seizure medication and has had vagus nerve stimulation; a procedure intended to help with his seizure activity.

4. Claimant's March 18, 2011 Individual Program Plan (IPP), and the Service Provision Agreement attached to the IPP, state that Claimant will receive 30 hours per month of in-home respite. The IPP also states that Claimant will receive 21 days of "OHR/OHP if needed or requested." The IPP does not define the "OHR/OHP", nor is the term defined in the Regional Center's new Purchase of Service Guidelines (the POS Guidelines) which were adopted in May 2011. However, the context suggests OHR refers to out of home respite and OHP refers to out of home placement. While the precise terms of Claimant's right to use in-home respite in lieu of out of home respite are not specified in the IPP, the parties do not dispute the fact that until the September 2011 NPA, Claimant's requests for in-home respite in lieu of out of home respite had been granted. Mother uses in-home respite in lieu of out of home respite to take a vacation.

Regional Center's Purchase of Service Guidelines for Respite

5a. The POS Guidelines describe out of home and in-home respite in detail. Out of home respite is defined as "intermittent or regularly scheduled temporary care provided outside of the consumer's home by a vendored service provider. . . . Out of home respite services are intended to assist the family in securing temporary outside support in providing appropriate care and supervision of the consumer." A variety of such providers, including day care centers and several different levels of residential facilities may provide out of home respite.

5b. The POS Guidelines also include criteria for consideration of out of home respite. In summary, they provide for out of home respite when a consumer's need for care and supervision exceed that of an individual of the same age who is not developmentally disabled. Such respite is available when, on an occasional basis, the consumer's needs are more than family and natural and community supports may provide. These occasions include opportunities for family members to participate in planned activities, such as vacations and hospitalizations, which preclude the involvement of the consumer. Finally, out of home respite is available when it is identified in the IPP. The Guidelines include a provision for exceptions in some circumstances.

5c. In-home respite is defined as "intermittent or regularly scheduled temporary non-medical care and supervision provided in the individual's home. The individual must reside with a family member to be eligible for respite services." The Guidelines include criteria to assist in determining the number of hours to be funded. The Guidelines also include a provision for exceptions in some circumstances.

5d. In-home respite is intended to assist family members in maintaining the consumer in the family home by relieving family members of the responsibility of providing constantly demanding care and supervision of the consumer. Family members need not be absent from the family home in order to use in-home respite.

6. When a consumer requests out of home respite, the Regional Center service coordinator assigned to the consumer's case will consult with the agency's placement coordinator to identify an appropriate residential facility with vacancies. After obtaining agency approval to place the consumer in an appropriate out of home facility, the service coordinator works with the facility and the consumer and his family to arrange a visit if requested, and to make the temporary placement of the consumer. The service coordinator provides the facility with pertinent information about the consumer and his needs.

7. The POS Guidelines provide for a limited exception to allow for in-home respite in lieu of out of home respite. This exception is relevant to this case. The POS Guidelines specify that in-home respite in lieu of out of home respite "may only be used when there is no out of home respite arrangement available." In Claimant's case that would mean that there is no residential facility able to address his many behavioral and safety, self-help, and medical needs at the time mother is requesting out of home or in-home respite in lieu of out of home respite services. In addition to the unavailability of a facility able to provide care for Claimant, Regional Center requires that mother show a specific plan making her unavailable to provide care. This could include things such as flight arrangements, or in the event of hospitalization, a physician's note indicating a need for the hospitalization. In addition, before approving in-home respite in lieu of out of home respite, Regional Center requires information about who will provide the in-home respite care, and written authorization for Regional Center to make unannounced visits to ensure the consumer's health and safety. When approving in-home in lieu of out of home respite, Regional Center limits the number of in-home respite in lieu of out of home respite hours that may be funded, not to exceed 16 hours per day.

8. The POS Guidelines contain a sequence of events that must occur before the Regional Center will consider in-home respite in lieu of out of home respite. This sequence starts with a request for out of home respite for a specified time, a determination whether a vendored facility is able to address Claimant's needs, and whether such facility has vacancies during the period of time requested. Arrangements may be made for the consumer and caregiver to visit the facility. According to the Regional Center representative, this process allows the consumer or parent to express concerns about a facility and for the Regional Center to address those concerns. A consumer or parent is under no obligation to accept an out of home respite facility if they do not want to use it. If Regional Center determines that it does not have an appropriate facility available during the time period requested, then Regional Center POS Guidelines permit funding for in-home respite in lieu of out of home respite.

Claimant's Objections to Out of Home Respite

9. Claimant has been receiving in-home respite in lieu of out of home respite since at least 2004. Claimant's older sister is Claimant's primary in-home respite provider. In August 2011, Mother's request for 155 hours of in-home respite in lieu of out of home respite was approved. Mother planned to take a vacation. Mother's request was approved because mother had not yet been informed that in May 2011, Regional Center had adopted its new POS Guidelines limiting the circumstances under which in-home respite in lieu of out of home respite would be funded.

10. In September 2011, mother requested 62 hours per month of in-home home respite in lieu of out of home respite and 30 hours per month of in-home respite. Regional Center denied the request for in-home in lieu of out of home respite. On September 12, 2011, Regional Center issues a Notice of Proposed Action (NPA) informing Claimant that it was denying funding for in-home respite in lieu of out of home respite. The NPA stated that Regional Center was declining to fund 21 days per year of in-home respite in lieu of out of home respite in response to changes to the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.),² intended to insure that the Regional Center complies with cost saving measures. The NPA indicates those changes were incorporated into the POS Guidelines for in-home and out of home respite services, as approved by the Regional Center Board of Directors after public review and comment, and approval from the California Department of Developmental Disabilities (department). The POS Guidelines were adopted in May 2011. Mother filed a request for a fair hearing. This hearing ensued.

11. Mother has declined to consider out of home respite and declined to explore possible out of home respite placements. She has many concerns about out of home respite placement. Among them is her concern that Claimant will be abused in a residential facility. She is concerned that Claimant's aggressive and self-injurious behaviors will be too difficult for a residential facility to properly handle. She is very concerned because Claimant has grand mal seizures. According to mother, Claimant runs away and jumps fences, requiring her to keep the home and yard locked at all times. She is also very concerned because Claimant is on a special diet, which requires constant supervision, because he will take food that is not locked up. According to the Regional Center representative, a residential facility is not permitted to lock the doors or grounds, or food storage facilities, although a facility that is appropriate for Claimant would have strategies to address such behaviors and can meet his dietary needs. Mother believes that others will be unable to provide Claimant with the safety and security that she and Claimant's sister provided him.

² All further statutory references to the Welfare and Institutions Code are cited by section number.

12. Mother has cared for Claimant throughout his life. Since a young age, mother has worked as a caregiver for people with disabilities. She is deeply concerned about her son's well being and welfare and distrustful of residential facilities. Her unwillingness to consider out of home respite placement is founded on her fears for his safety and the safety of others. She trusts her daughter to care for Claimant when she is away from the home. It is worth noting that Claimant attends school five days per week, and that although he does have behavior problems in that environment, it has not precluded his attendance. Mother receives a log from Claimant's teachers reporting on how Claimant is doing. It is possible that similar strategies could also be utilized to help mother build confidence in an out of home respite facility, thus relieving some of her concerns about residential facilities, and relieving her of some of the demands of caring for Claimant.

LEGAL CONCLUSIONS

1. The Lanterman Act (§ 4500 et seq.) governs the provision of services to Claimant. In accordance with the Lanterman Act, a regional center is required to secure services and supports that meet the individual needs and preferences of consumers (§§ 4501 and 4646, subd. (a)); support their integration into the mainstream life of the community (§§ 4501 and 4646, subd. (a)); "foster the developmental potential of the person" (§ 4502, subd. (a)); and "maximize opportunities and choices for living, working, learning and recreating in the community." (§ 4640.7, subd. (a).)

2. The consumer's needs are determined through the IPP process. "The individual program plan is developed through a process of individualized needs determination. The individual with developmental disabilities and, where appropriate, his or her parents, legal guardian or conservator, or authorized representative, shall have the opportunity to actively participate in the development of the plan." (§ 4646, subd. (b).)

3. The standard of proof in this matter is a preponderance of the evidence. Regional Center bears the burden of proof to the extent that it seeks to change its prior practice for approval of funding for in-home respite in lieu of out of home respite. Once Regional Center meets its burden, Claimant bears the burden of showing that an exception exists under the law that would permit him to receive additional respite services.(§ 4686.5, subd. (a)(3)(A).)

4. In July 2009, in light of California's unprecedented budget crisis, the Lanterman Act was amended to add section 4686.5. Section 4686.5 provides, in pertinent part:

(a) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, all of the following shall apply:

(1) A regional center may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities.

(2) A regional center shall not purchase more than 21 days of out-of-home respite services in a fiscal year nor more than 90 hours of in-home respite services in a quarter, for a consumer.

(3)(A) A regional center may grant an exemption to the requirements set forth in paragraphs (1) and (2) if it is demonstrated that the intensity of the consumer's care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home, or there is an extraordinary event that impacts the family member's ability to meet the care and supervision needs of the consumer.

[¶] . . . [¶]

5. "In-home respite services" are defined in the Lanterman Act as "intermittent or regularly scheduled temporary nonmedical care and supervision provided in a client's own home, for a regional center client who resides with a family member." (§4690.2, subd. (a).) Subdivision (a) of section 4690.2 goes on to state that respite services are designed to "do all of the following: (1) Assist family members in maintaining the client at home. (2) Provide appropriate care and supervision in maintaining the client's safety in the absence of family members. (3) Relieve family members from the constantly demanding responsibility of caring for the client. (4) Attend to the client's basic self-help needs and other activities of daily living including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by family members." The POS Guidelines are very similar to the statutory definition and objectives for in-home respite.

6. Out-of-home respite is defined in the pertinent regulations as "intermittent or regularly scheduled temporary care to individuals in a licensed facility and which:

1. Are designed to relieve families of the constant responsibility of caring for a member of that family who is a consumer;

2. Meet planned or emergency needs;

3. Are used to allow parents or the individual the opportunity for vacations and other necessities or activities of family life; and

4. Are provided to individuals away from their residence." (Cal. Code Regs., tit. 17, § 54342, subd. (a)(58)(E).)

The POS Guidelines are very similar to the regulatory definition and

objectives for out of home respite.

7. Section 4646.4 was also added to the Lanterman Act in 2009 as a cost-containment measure in response to the current state budget crisis. In particular, section 4646.4, subdivision (a), requires regional centers to ensure that a consumer's IPP adheres to federal and state law and regulation, and when purchasing supports and services “[c]onform[s] with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.” Section 4434, subdivision (d), requires the department to review any new or amended purchase of service policies prior to implementation by a regional center. These provisions allow regional centers to adopt reasonable purchase of service policies so long as they comply with the law.

8. In adopting section 4686.5 specifying a limit of 90 hour per quarter of in-home respite and 21 days per year of out of home respite, the Legislature clearly expressed its intent to treat the two types of respite differently. As required by Section 4646.4, subdivision (a)(1) and section 4434, ELARC’s POS Guidelines, as approved by the department, distinguish between in-home respite and out of home respite, and comply with the statutory and regulatory scheme for both in-home respite and out of home respite.

9. In this case, Regional Center does not dispute that Claimant’s needs “exceed that of an individual of the same age without developmental disabilities.” (§ 4646.5, subd. (a)(1).) Because Claimant’s needs are substantial, Claimant receives the 90-hours per quarter (30 hours per month) of in-home respite permitted by section 4686.5, subdivision (a)(2) and by the POS Guidelines. Moreover, Regional Center does not dispute that Claimant may receive out of home respite as permitted by section 4686.5, subdivision (a)(2), and by the POS Guidelines.

10. The dispute in this case is whether Regional Center is required to convert out of home respite into additional in-home respite. Neither the statute nor the implementing regulations provide for such conversion, although a statutory exemption from the limitations on the amount of both in-home and out of home respite is available when it is necessary to maintain a consumer in the home, or where an “extraordinary event . . . impacts the family member’s ability to meet the care and supervision needs of the claimant.” (§ 4646.5, subd. (a)(3)(A).) The POS Guidelines implement this exception by allowing the conversion of out of home respite into in-home respite when Regional Center is unable to provide an appropriate out of home respite placement for the consumer. This approach is an acknowledgement that ELARC may not always be able to provide an appropriate out of home respite placement when the consumer and his family members are otherwise entitled to it. The POS Guidelines do not create a right to in-home respite in lieu of out of home respite. Rather, the Guidelines accommodate the difficulties that may occur when trying to find an appropriate out of home respite placement at a time when family members request it.

11. When Claimant requested in-home respite in lieu of out of home respite in September 2011, there was no evidence that either of the statutory exceptions allowing for additional in-home or out of home respite services applied. While it is clear that Claimant's needs are significant, Claimant presented no evidence that additional respite was needed to maintain Claimant in his home. Nor is there any evidence that an extraordinary event was impacting the family's ability to care for Claimant at the time the request was made. Nor did the exception found in the POS Guidelines apply because mother declined to consider out of home respite.

12. While mother's request to have Regional Center fund in-home respite in lieu of out of home respite is understandable, she has not established a sufficient factual basis to find that an exception allowing for such funding should be granted. Under the POS Guidelines, if mother requests out of home respite, Regional Center must consider Claimant's needs in determining the appropriateness of a facility. Nothing in the record indicates that Regional Center will not carry out this duty. In fact, the record supports the finding that Regional Center is well aware of Claimant's needs. His 2011 and 2012 IPP document Claimant's needs. His service coordinator has been assigned to his case for many years and from her testimony, it appears she has a good understanding of Claimant's needs and mother's concern for Claimant's well being.

13. Because mother has not requested out of home respite, Regional Center has not begun the process of determining if an appropriate out of home respite placement is available. Regional Center acknowledges that it is possible that there may not be an appropriate facility available for Claimant when mother wants respite, and in that case, the POS Guidelines would allow for an exception. However, it is not possible to determine the availability of an appropriate facility if mother declines to consider any out of home respite placement. It is worth noting that mother is not required to use a suggested facility if she chooses not to. But, by refusing to consider the possibility that an appropriate facility can be identified, mother forecloses the possibility that Regional Center will consider whether an exception exists under its POS Guidelines.

14. In light of Factual Finding 1 through 12 and Legal Findings 1 through 13, the Regional Center is not required to fund in-home respite in lieu of out of home respite under the facts and circumstances present in this case.

ORDER

Claimant's appeal is denied. Eastern Los Angeles Regional Center is not required to fund additional in-home respite services in lieu of out of home respite services.

Dated: April 10, 2012

DEBORAH M. GMEINER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is a final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.